



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI COMMERCIAL
COURTS)**

Civil Case 647 of 2001

A TOUCH OF VELVET LTD.

HENRY HILLARY NJOROGE

KAREN WANJIRU NJOROGE

LICORNE PHARMACEUTICALS LTD.PLAINTIFFS

VERSUS

NATIONAL BANK OF KENYA.....DEFENDANTS

R U L I N G

The application by way of Chamber Summons dated 10.5.2005 seeks one principal prayer that an injunction do issue restraining the defendant from further advertising for sale, selling by public auction or private treaty, leasing, possessing, occupying or otherwise howsoever dealing with LR No.7565/2 Red Hill, Kiambu District pending the hearing and final determination of this suit.

On the same day the application was certified urgent and fixed for hearing inter partes on 17.5.2005. On the latter date the application was adjourned to 9.6.2005 and the auction which had been scheduled for 24.5.2005 cancelled. On 9.6.2005 and since the application has been adjourned for various reasons with an order that the parties do maintain the status quo. The application was finally canvassed before me on 10.5.2007 by Mr. Kangethe, Learned counsel for the plaintiff and Mr. Rachuonyo, Learned counsel for the defendant.

The debate before me revolved around whether the defendant had varied the contract of guarantee, whether the filing of **HCCC No.194 of 2003** by the defendant precluded the defendant from exercising its statutory power of sale and whether the compromise recorded in **HCCC No. 647 of 2001** precludes the plaintiff from seeking the orders in this application.

On the issue of variation, I have not been persuaded by the argument made by the plaintiffs that the demand made in K.shillings when the original contract was in US Dollars would entitle the plaintiffs to an order of injunction. That complaint in my view camouflaged a dispute on the amount due which ordinarily is not a basis for the granting of a temporary injunction.

In my view this application turns on the consequences of the orders made in **HCCC No.194 of 2003** and in this case. On 25.9.2002 the following consent order was recorded:-

“1. That the application dated 4.5.2001 be and is hereby marked as settled in the following terms:

(i) The defendant be at liberty to serve fresh statutory notices in respect of all the charged properties.

(ii) Upon expiry of the statutory notices, the defendant be at liberty to proceed with the sale of the properties if payments will not have been made.”

It can be appreciated that the terms of the compromise were quite clear. It is not in dispute and indeed the plaintiffs do not allege that payments have not been made and that the defendant served fresh statutory notices. What to my mind has not come out clearly is the fate of LR. Nos. KAJIADO/KITENGELA/6183, 5855/21, 5855/22, KWALE/DIANI SETTLEMENT SCHEME/339, KWALE/SHIMBA NORTH/KUNDUTSI “B”/1543 AND L.R.. No. MN/1/6157. Those titles are not involved in this application. Were the properties realized and if so, how much was realized?

Notwithstanding the compromise, the defendant instituted **HCCC No.194 of 2003** against the plaintiffs for the sums advanced to the plaintiffs together with interest and costs. It is not in dispute that that suit is pending hearing. Prima facie, it would appear as if in filing that suit the defendant sent the message to the plaintiff that it would not keep to the terms of the compromise. In those circumstances in my view the plaintiffs were perfectly entitled to institute a fresh application for interlocutory relief when during the pendency of **HCCC 194 of 2003**, the defendant sought to exercise its statutory power of sale. The recovery suit by the defendant presented a new factual situation which could not have been in the contemplation of the parties when the compromise was recorded.

The defendant has made a powerful plea that the subject property is valued at Kshs.6,000,000.00 and even if it is sold the plaintiff would still owe large sums to the defendant and the recovery suit will still have to be proceeded with for the balance. No mention however is made of the other securities referred to above.

In the premises I am of the view that the plaintiffs were entitled to invoke the provisions of Section 52 of the Indian Transfer of Property (Amendment) Act (1852) which reads as follows:-

“During the active prosecution in any court having authority in British India or established beyond the limits of British India or established by the Governor-General in council of a contentious suit or proceeding in which any right of immovable property is directly and specifically in question the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein except under the authority of the court and on such terms as it may impose.”

There is no doubt that all the ingredients necessary for the application of Section 52 (ITPA) exist in the **HCCC No. 194 of 2003**: Pleadings are closed, issues framed and pretrials have been completed. The suit I am informed has previously been fixed for hearing and it touches on the subject property. The defendant had therefore to seek the authority of the court to realize its securities. It did not. In those premises the plaintiffs are entitled to seek redress from the court if only to preserve the subject property pending hearing of the suit.

I am also persuaded that the plaintiffs have shown a prima facie case that they may suffer double jeopardy. They averred in paragraph 19 of the supporting affidavit that the defendant had in the recent past sold two properties which were pledged as security for the same loan namely L.R. No. Kajiado/Kitengela/6183 and L.R. No.6157/Section 1/Mainland North – Mombasa Municipality but the defendant had not disclosed how much was realized in the sale nor credited the proceeds thereof to the account of the principal debtor. The defendant did not respond to that deposition in its replying affidavit and supplementary affidavit subsequently filed.

I am therefore satisfied that the plaintiffs have established the 1st requirement for the grant of an interlocutory injunction set in **Giella vs. Cassman Brown & Co. [1973] EA 358**. With regard to the second condition, I am also persuaded that the same has been shown particularly in view of the silence of

the defendant with respect to the fate of L.R. Nos. Kajiado/Kitengela/6183 and 6157/Section 1/ Mainland North – Mombasa Municipality.

In the end the plaintiffs application dated 10.5.2005 is allowed as prayed in paragraph 2 thereof. The plaintiffs should file separate undertakings under oath as to damages within the next 7 days from the date hereof.

I grant liberty to the defendant to apply.

Costs shall be in the cause.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 7th day of June 2007.

F. AZANGALALA

JUDGE

Read in the presence of:-

Kangethe for the plaintiff and MS. Njeru holding brief for Rachuonyo for the defendant.

F. AZANGALALA

JUDGE

7/6/07